IN THE SUPREME COURT

OF THE STATE OF MONTANA

Supreme Court No. DA 10-0063

DANIEL and ELAINE BADLEY,

Plaintiffs and Appellees,

-vs-

CLINTON JOHN MORRIS,

Defendant and Appellant.

On Appeal from the Montana Eleventh Judicial District Court,
Flathead County Cause No. DV-06-690(C), Honorable Stewart E. Stadler

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APPELLANT'S BRIEF

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ISSUES

The issues on appeal are as follows:

1. Did the district court err in awarding summary judgment to Badleys by ruling that all use by Edna Greene, Kelsey Morris and John Morris was permissive and that the permissive use had not been exceeded in scope?
2. Did the district court err in awarding summary judgment to Badleys without considering the use of Morris' predecessors in interest?
3. Did the district court err in denying summary judgment to John Morris where the evidence was undisputed that his wife, Kelsey Morris, used the road nearly every day for five years in a manner that exceeded the alleged permission?

STATEMENT OF THE CASE

Daniel and Elaine Badley (Badleys) and John Morris own property adjacent to one another. Badleys sued Morris for trespass and nuisance based upon his use of the road that straddled the boundary line between the properties.

Morris moved for summary judgment to establish that he had a prescriptive easement to use the portion of the road on Badleys' property. In support of his motion, he submitted the affidavit of Kelsey Morris and filed the deposition of Elaine Badley.

The Badleys filed a response and cross-motion for partial summary judgment on the easement issue, but only as to John and Kelsey Morris' use. Badleys submitted an affidavit of Elaine Badley, an *unsigned* affidavit of Edna Greene and the deposition of Greene to support their position. *See Exhibits D & E, Pl.'s Resp. to Def.'s Mot. For S.J; Exhibits J & N, Pl.'s Supplemental S.J. Documents*.

The district court denied John Morris' motion for summary judgment and granted Badleys' cross-motion. Following the ruling on summary judgment, John Morris substituted his new counsel for prior counsel. John Morris then submitted a motion to reconsider, with an affidavit of Edna Greene unequivocally stating that Badleys never gave her permission to use the road.

The district court summarily denied John Morris' motion to reconsider. The parties settled the non-easement issues and Morris appealed.

STATEMENT OF THE FACTS

Daniel and Elaine Badley (Badleys) and John Morris own property adjacent to one another in Flathead County. A diagram of the parties' property, which was submitted to the district court in the motions, is attached as Appendix 2 for convenience. Badleys bought tracts 10F and 10FA (on the diagram) in 1992. In 1993, Edna Greene (Greene), John Morris' mother-in-law, purchased the

neighboring tracts, 10J and 10JA. In 1996, 10JAA was created and is currently owned by Kelsey Morris and her husband, John Morris.

At the boundary line between their respective properties, a road exists for the ingress and egress to both homes. It also serves as access to the home of the Mortons, who are not party to this action. The road existed prior to either Badleys or Greene taking ownership of their property, although it was not as wide as it is today. *Aff. of Badley*, ¶ 2, Exhibit E to *Pl.'s Resp. to Mot. For S.J.* The original road straddled the boundary line between the properties (*Id.*), however, at the time of the motions no evidence existed in the record about where the original road was located in relation to the boundary, i.e., how much of the road was on one property or the other.

John Morris' property was created in 1996 from a larger parcel owned by Greene. *Depo. of E. Greene* at 16:21-25. From 1993 until 2001, a mobile home was placed upon the property and used as a rental. *Id.* at 15:18-21. The subject road provided access to the rental from Cobbler Village Road. Importantly, no evidence had been presented to the district court on the use of the roadway by the renters.

At the time of creating the rental property, Greene widened the original roadway toward her property, and improved the portion of the original roadway that lied on Badleys' property. *Greene Depo.* at 22:25-23:10, 23:25-26:22, 27:6-11,

33:2-5. The parties disagreed on whether Badleys gave Greene permission to use their part of the roadway.

According to Elaine Badley, she gave Greene permission to use the roadway, but with a limited scope to pass oncoming traffic:

> Q: Who in particular might you have expressly permitted to use your driveway?
> A: When Ed[na Greene] and I were making agreements on the culvert and putting her driveway in, we did laugh back and forth at each other that of course if you meet traffic, you obviously are going to have to go to the right to get away from traffic.
> Q: So you gave [Edna Greene] permission?
> A: To pass people on the correct side, yes.
> Q: How about Kelsea [sic]?
> A: No.

E. Badley Depo., 64:5 – 65:8.

However, according to Greene, she did not discuss any particulars with Elaine Badley on how the road was to be improved, let alone the scope of use:

> Q: Okay. So did you and the Badleys then discuss how you were going to provide ingress and egress to your renters?
> A: Pretty much. I had Elaine visit with Woodring. I hired Woodring to extend the road.
>
> * * *
>
> Q: Okay. And was that something, again, that you – that you decided on with the Badleys as far as which way it would be widened, how much?
> A: No. I did not discuss that with Elaine. I asked if they would discuss it with Woodrings.

*Greene Depo.*at 23:13-17, 33:6-10.

Badleys never asked Greene in her deposition if Badleys had granted limited permission. Instead, Greene testified several times that she used the property under a right and not with permission:

Q: Okay. And did you feel that your renters would have a right to use that roadway?
A: Yes.
Q: Okay. And could you tell me where that idea came from?
A: Well, before I even put a trailer house on there I was – there were cars going up and down the roadway.

* * *

Q: So did you assume that then you owned to the middle of the roadway that was already there?
A: Yes.

* * *

Q: So had you felt at that time that you had a right to use the existing road, or did you –
A: Yes, I did.

* * *

Q: Okay. And so is it your belief that you have a legal right to use the western 30 feet of the Badleys' property?
A: Yes.

Greene Depo. at 18:6-13, 22:16-18, 26:23-25, 40:15-18.

Greene conveyed tract 10JAA to her daughter, Kelsey Morris in 1996. *Aff. of K. Morris*, ¶ 2. It is undisputed that Badleys did not give permission to Kelsey Morris. *E. Badley Depo.*, 65:7-8. Kelsey agrees and testified that she "never asked

either Elaine Badley or Daniel Badley for permission to use this 30 foot strip of land," and, further, that "neither Elaine Badley nor Daniel Badley has ever expressed in any form any grant of permission to me to use this thirty foot strip of land." *Aff. of K. Morris*, ¶¶5-6.

Kelsey moved onto the property on March 1, 2001. *Aff. of K. Morris*, ¶ 2. Kelsey testified to her extensive use of the roadway since moving into her house:

> Since moving into the house at this address, I have traveled from this house to the public road known as Cobbler Village Road across a strip of land some 30 feet in width along the western boundary of the land of Plaintiff Elaine and Daniel Badley. This 30 foot strip is what the Badleys call their driveway. I have traveled across this land of the Badleys' on an almost daily basis, many times more than once on the same day, usually in broad daylight and sometimes at night. Additionally, when necessary to avoid other vehicles, obstacles in the road or potholes, I have on occasion traveled to my residence on the Badleys' thirty foot strip of land.

Aff. of K. Morris, ¶4.

In 2003, Kelsey married John Morris. John Morris began his use in that year.

STANDARD OF REVIEW

Appeals from rulings on summary judgment are reviewed de novo. *Tacke v. Energy West, Inc.*, 2010 MT 39, ¶16, 355 Mont. 243, 227 P.3d 601. When ruling on motions for summary judgment, a district court shall consider all affidavits and depositions of record. *See* Rule 56(c), M.R.Civ.P.; *Edwards v. Cascade County*

Sheriff's Dept., 2009 MT 451, ¶38, 354 Mont. 307, 223 P.3d 893. All facts must be viewed in the light most flattering to the non-moving party. *Giacomelli v. Scottsdale Ins. Co.*, 2009 MT 418, ¶13, 354 Mont. 15, 221 P.3d 666.

SUMMARY OF ARGUMENT

The main issue in this case concerns Badleys' claim that they gave Greene permission to use the road to pass oncoming traffic. The district court erred when it ruled the use was permissive for at least three reasons. First, to reach this conclusion, the district court wrongfully construed facts in favor of Badleys, who were claiming the use was permissive, when Greene presented evidence that contradicted Badleys' claim. Second, the court seemed to ignore the undisputed fact that Kelsey Morris exceeded the scope of the alleged permission for more than five years. Third, the district court erred when it ruled as a matter of law that the alleged permission given to Greene automatically transferred to Kelsey Morris.

If this Court properly considers the facts that were in the record and applies the proper burden shifting analysis, summary judgment would be proper for John Morris. Relying upon his wife's use, the record is undisputed that Kelsey Morris made a prima facie showing of prescriptive rights. Shifting the burden to Badleys to show the use was permissive, they fail because they did not give permission to Kelsey Morris, and even if permission is imputed to her, the undisputed testimony

is that she exceeded the scope of the permission for five years and thus established rights.

Judgment should be entered in favor of John Morris. At a minimum, this matter should be reversed and remanded for trial for the reasons stated above. Additionally, the district court's order should be construed as a partial summary judgment because the facts presented to it concerned only Kelsey Morris' use over the past five years and the court did not consider the use of her renters which would have also established rights.

ARGUMENT

ISSUE 1: DID THE DISTRICT COURT ERR IN AWARDING SUMMARY JUDGMENT TO BADLEYS BY RULING THAT ALL USE BY EDNA GREENE, KELSEY MORRIS AND JOHN MORRIS WAS PERMISSIVE, AND THAT THE PERMISSIVE USE HAD NOT BEEN EXCEEDED IN SCOPE?

A. Issues of fact exist which preclude summary judgment only to Badleys concerning whether permission was given, and if so, whether prescriptive rights have been established beyond the scope.

The district court erred when it ruled that Badleys had granted permission to Greene in 1993. The district court erred in construing the facts in favor of the party claiming permission, the Badleys.

In a summary judgment motion, all evidence must be viewed in a light most favorable to the non-moving party. *Thorton v. Flathead County,* 2009 MT 367, ¶13, 353 Mont. 252, 220 P.3d 395. Here, Badleys are not only the moving party, but also under the burden shifting analysis set out by this court on issues involving prescriptive easements, Badleys had the burden to defeat a showing of prescription by permissive use. *Slauson v. Bertelsen Family Trust*, 2006 MT 314, ¶16, 335 Mont. 43, 151 P.3d 866. Therefore, evidence concerning permissive use should be construed in favor of Morris.

It is undisputed that to accommodate the mobile home rental that Greene established in 1993, access to the property now owned by Morris from Cobbler Village Road was provided via the roadway in question. It is further undisputed that the roadway in question was widened and improved. While Elaine Badley testified the roadway was widened for that purpose (*Aff. of E. Badley*, ¶4), Greene testified it was widened to install a ditch to prevent a possible flooding issue to the Badleys. *Greene Depo.* at 27:1-8.[1] While this may create an issue of fact, the material issue of fact concerns the alleged permission granted by Badleys.

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[1] Q: Then why did you pay to widen the existing road?
A: I'm not sure that the road was widened at the time that Elaine said my snow was running into her garage and I had to put a ditch all the way down.
Q: So –
A: In order to put a ditch in, the road had to be widened.

1. Greene denied that she was given permission; she testified her use was under a right to use the roadway.

The key fact relied upon by the district court was that "Badley states that she gave permission to Greene and the renters of the mobile home to use Badley's portion of the roadway if vehicles met one another and needed to pass." *Order* at 3, l.16. The district court then goes on to find that this fact is undisputed: "Plaintiffs have presented undisputed evidence that use of the road began as a neighborly accommodation or courtesy." *Order* at 4, 1.16.

Yet, the record before the district court included deposition testimony that clearly contradicted Elaine Badley's affidavit. In fact, Greene never testified to permissive use, but, instead, was unequivocal that her use was based on a right to use the road:

Q: Okay. And did you feel that your renters would have a right to use that roadway?
A: Yes.
Q: Okay. And could you tell me where that idea came from?
A: Well, before I even put a trailer house on there I was – there were cars going up and down the roadway.

* * *

Q: So did you assume that then you owned to the middle of the roadway that was already there?
A: Yes.

* * *

Q: So had you felt at that time that you had a right to use the existing road, or did you –
A: Yes, I did.

* * *

Q: Okay. And so is it your belief that you have a legal right to use the western 30 feet of the Badleys' property?
A: Yes.

Greene Depo. at 18:6-13, 22:16-18, 26:23-25, 40:15-18.

Greene's testimony before the Court undoubtedly created a genuine issue of material fact about whether permission was given or even discussed. The district court should have construed the evidence in favor of Greene. The district court erred in relying exclusively on Elaine Badley's affidavit and finding not only that Badleys had given permission, but also that such evidence was undisputed. In Morris' motion to reconsider, he submitted an affidavit from Greene that unequivocally denied that her use of the roadway was by permission since Badleys did not ask this question of Greene directly in her deposition. *Aff. of E. Greene, Def.'s Mot. To Reconsider.* Even without that affidavit, enough evidence existed in the record to show that an issue of fact existed.

2. **Even if Badleys gave permission to Greene, Kelsey Morris exceeded the scope of the alleged permission.**

Prescriptive rights may be established where use by a dominant tenement exceeds the scope of any permissive use. In *Wilson v. Chestnut*, 164 Mont. 484,

490, 525 P.2d 24, 27 (1974), this Court, citing to *Thompson on Real Property (1961 Replacement)*, Easements, § 345, stated "the general rule regarding the effect of permission upon prescription" as follows:

> If the user began by the permission of the owner, it will not ripen into an adverse or hostile right until notice of such adverse user is brought home to the owner and the user continued thereafter for the statutory period.

Thus, prescriptive rights may be established where use by a dominant tenement exceeds the scope of any permissive use.

The district court erred in concluding that "use of the Badleys' portion of the roadway continued to be permissive when the mobile home and its surrounding property were given to Kelsey Morris." *Order* at 4, l.19. Citing to *Wilson*, the district court also stated that "continuation of use in the permitted manner cannot bring home notice of the adverse intent of the user," and then ruled that "Defendant has not produced evidence of any actions by Kelsey Morris that were a deviation from the use of the roadway permitted by [Badley]." *Order* at 5, l.3.

Here, even assuming for the purposes of argument that Badleys granted permission, it is undisputed that Kelsey Morris' use exceeded that scope. Elaine Badley testified that the scope of her alleged permission was to use Badleys' portion of the roadway "if vehicles met one another and needed to pass." *Aff. of E.*

Badley, ¶4. However, Kelsey Morris testified to her use of the roadway, which far exceeded the scope of any alleged permission:

> Since moving into the house at this address, I have traveled from this house to the public road known as Cobbler Village Road across a strip of land some 30 feet in width along the western boundary of the land of Plaintiff Elaine and Daniel Badley. This 30 foot strip is what the Badleys call their driveway. I have traveled across this land of the Badleys' on an almost daily basis, many times more than once on the same day, usually in broad daylight and sometimes at night.

Aff. of K. Morris, ¶4.

Kelsey's testimony is undisputed. While Badleys argued that "Kelsey used the roadway to get to Cobbler Village Road, and may have occasionally crossed over the boundary, onto Badleys' half of the roadway, as part of that permissive use" (*Pl.'s Resp. M.S.J.* at 3; *see also Resp.* at 4), this statement is not supported by an affidavit or cite to a deposition. Therefore, it cannot be used to create an issue of fact in a motion for summary judgment. *Powell County v. 5 Rockin' MS Angus Ranch, Inc.*, 2004 MT 337, ¶14, 324 Mont. 204, 102 P.3d 1210 (Unsupported statements do not create issues of fact precluding summary judgment).

At a minimum, the district court erred in not construing the evidence in favor of Kelsey Morris as it related to her use exceeding the scope of the alleged permission by Badleys. Moreover, the district court erred in not ruling that

Kelsey's use ripened into adverse use by exceeding the scope of the alleged permission given.

B. As a matter of law, the district court erred in ruling that Kelsey Morris' use was permissive based upon a neighborly accommodation given to Edna Greene.

Factually, the district court erred in finding that that Morris' use began as permissive or neighborly accommodation. As a matter of law, however, the district court erred in ruling that the Badleys were not required to give permission to Kelsey Morris to continue the permissive use (allegedly given to Greene).

The district court stated:

> The Montana Supreme Court has opined that "neighborly accommodation is a form of permissive use which, by custom, does not require permission at every passing. [Citation omitted.] Plaintiffs were consequently not required to grant express permission to Kelsey for her use to continue to be of a permissive nature.

Order at 4, ll.22-27.

The district court erred as a matter of law in two respects. First, the court erred in its ruling that permissive use is transferable. Second, it erred in ruling that in the context of neighborly accommodation, express permission is not required at every passing *when the facts here are that the passing occurred by an owner of property other than the dominant tenement.*

Permissive use is not transferable in Montana. *Han Farms, Inc. v. Molitor*, 2003 MT 153, ¶14, 316 Mont. 249, ¶14, 70 P.3d 1238, ¶14. In *Han Farms*, it was not enough that a predecessor in interest to Han Farms was given permission to use a roadway; because Molitor never gave permission to Han Farms itself, the Court found that Han Farms' use was not permissive despite the fact that the use might have began as such when a predecessor was the user. *Id.*, ¶16.

Here, despite the fact that the issue of permission is disputed, it remains undisputed that the alleged permission, if given, was given only to Greene and not Kelsey Morris. *E. Badley Depo.* at 65:7-8; *Aff. of K. Morris*, ¶¶5-6. In other words, even if it were assumed for the sake of argument that Edna Greene's use of the roadway began as permissive, based on *Han Farms*, the alleged permission from Badleys to Greene did not transfer when Greene transferred tract 10JAA to Kelsey.

The Court also incorrectly applied the law of neighborly accommodation to the facts before it on whether permission is required at every passing. While it is true that neighborly accommodation is a form of permissive use, the rule that it does not require permission at every passing applies to the dominant tenement. Here, assuming the district court's finding that Greene's use was permissive, the rule simply means that Greene would not need to request permission every time she passes, not that her permission would transfer to Kelsey Morris. This rule is

consistent with the holdings that the district court cited for neighborly accommodation. *Heller v. Gremaux*, 2002 MT 199, 311 Mont. 178, 53 P.3d 1259; *Tomlin Enters., Inc. v. Althoff*, 2004 MT 383, 325 Mont. 99, 103 P.3d 1069.

Therefore, as a matter of law, the district court erred when it ruled that Badleys were not required to grant permission to Kelsey Morris.

ISSUE 2: DID THE DISTRICT COURT ERR IN GRANTING SUMMARY JUDGMENT TO BADLEYS WITHOUT CONSIDERING THE USE OF MORRIS' PREDECESSORS IN INTEREST?

Procedurally, Morris first moved for summary judgment based upon Kelsey's use for the five years prior to the date of the lawsuit. In response, Badleys cross-moved for summary judgment based upon that same use. The district court, perhaps inadvertently, granted summary judgment against Morris as to all rights, whereas its ruling was more properly a partial summary judgment to the extent John Morris relied upon Kelsey Morris' use.

An owner can also establish prescriptive rights through the use of its tenants. *Slauson v. Bertelsen Family Trust,* 2006 MT 314, ¶15, 335 Mont. 43, 151 P.3d 866; *Cook v. Hartman*, 2003 MT 251, ¶¶ 26-28, 317 Mont. 343, 77 P.3d 231. This Court has reversed and remanded prescriptive easement cases where prior use of a road is unexplained and where that use might satisfy the elements for a prescriptive easement. *Leisz v. Avista Corp.*, 2007 MT 347, ¶35, 340 Mont. 294, 174 P.3d 481.

Here, renters used the roadway from 1993 to 1996 while Greene owned the property, and from 1996 to 2001 when Kelsey Morris owned the property. This five or eight year period would be sufficient time to establish prescriptive rights. Furthermore, it is reasonable, if not likely, that the evidence would prove that the renters traveled upon the Badleys' portion on a regular basis. A picture of the roadway is found in Appendix 3. The center of the road is not depicted with any markings. Prudent driving would dictate that drivers normally drive on the right side of the road. Therefore, one can easily presume that the renters would drive on the Badleys' side at least half the time they used the roadway. By the same logic, it seems entirely unreasonable for Badleys to argue that the renters would drive only on the left side of a roadway except when facing on-coming traffic.

This information would provide John Morris with rights other than those based upon Kelsey's use.

Therefore, John Morris still has the right to claim prescription based on the use of his predecessors. The district court's ruling focused only on Kelsey Morris' use and did not address use by predecessors in interest or that of their renters. Kelsey and John Morris can establish a prescriptive easement by their use alone, but for the court to grant Badleys' motion on all of Morris' prescriptive rights, the district court would need to consider the rights established under the use of predecessors in interest or their renters.

ISSUE 3: DID THE DISTRICT COURT ERR IN DENYING SUMMARY JUDGMENT TO JOHN MORRIS WHERE THE EVIDENCE WAS UNDISPUTED THAT HIS WIFE, KELSEY MORRIS, USED THE ROAD NEARLY EVERY DAY FOR FIVE YEARS IN A MANNER THAT EXCEEDED THE ALLEGED PERMISSION?

Despite the issues of fact that exist which preclude summary judgment to Badleys, Kelsey and John Morris are nevertheless entitled to summary judgment. The differences are that John and Kelsey can establish prescriptive rights based upon Kelsey's use since 2001, and either the Badleys cannot sustain their burden to prove permission, or their alleged permission was undisputedly exceeded.

Kelsey Morris' use and rights are integral to John Morris' argument. Since John Morris married Kelsey in 2003 and moved onto the property at that time, it is undisputed that he cannot establish the requirement of five years. However, as Kelsey's husband, he is entitled to the benefit of the rights Kelsey acquired. *Leisz v. Avista Corp.*, 2007 MT 347, ¶35, 340 Mont. 294, 174 P.3d 481 ("[U]se by the claimant's predecessor in title may be used by the claimant to prove the existence of a prescriptive easement."); *Rude v. Marshall*, 54 Mont. 27, 29-30, 166 P. 298, 299 (1917); *see also Peoples v. Hagaman*, 215 S.W.2d 827, 831, 31 Tenn. App. 398, 408 (Tenn. Ct. App. 1948) ("Where a family has lived in continous [sic] adverse possession of land, the title being in one of them or in different members

of the family at different times, they stand in such privity one to another that the tacking of the possessions is permissible.")

A. Kelsey Morris established prescriptive rights.

The elements for prescriptive easements and the proper burdens for each party were aptly stated in *Leisz*:

> To establish an easement by prescription, the party claiming the easement must show open, notorious, exclusive, adverse, continuous and uninterrupted use of the claimed easement for the full statutory period of five years. The burden is on the person claiming the easement to prove these elements by clear and convincing evidence.
>
> * * *
>
> Because the theory of prescriptive easement is based on adverse use, if the owner of the servient estate shows that use was permissive, no such easement can be acquired. However, if the claimant satisfies his or her burden, "a presumption of adverse use arises and the burden shifts to the landowner affected by the prescriptive claim to establish that the claimant's use was permissive."

Leisz, ¶¶16-17 (internal citations omitted).

As established above, Kelsey's use of the roadway satisfies these elements. She testified that:

> Since moving into the house at this address, I have traveled from this house to the public road known as Cobbler Village Road across a strip of land some 30 feet in width along the western boundary of the land of Plaintiff Elaine and Daniel Badley. This 30 foot strip is what the Badleys call their driveway. I have traveled across this land of the Badleys' on an almost daily basis,

> many times more than once on the same day, usually in broad daylight and sometimes at night.

Aff. of K. Morris, ¶4.

This evidence is not disputed by any affidavit or deposition on behalf of Badleys. Therefore, on its face, Kelsey has sustained her burden.

In their Brief, Badleys argued that Kelsey cannot establish prescriptive rights for three reasons. First, Badleys argue that Kelsey's use was not hostile because "there were no difficulties between her and the Badleys." *Pl.'s Resp. M.S.J.* at 5. Second, Badleys argue that her use was not continuous because she drove on Badleys' portion of the roadway only occasionally. *Id.* Third, her use was not for five years.

Kelsey's use was indeed hostile. "Hostile use" describes the "open and notorious" requirement, and is often cited as a distinct and positive assertion of a right hostile to the rights of the owner and brought to the attention of the owner. *Clark v. Heirs & Devisees of Dwyer*, 2007 MT 237, ¶25, 339 Mont. 197, 170 P.3d 927. Kelsey's open and daily use of the road satisfies these elements. Even if neighbors get along, prescriptive rights can still be established. *Valcarce v. Fitzgerald*, 961 P.2d 305, 312 (Utah 1998) ("[T]he fact that the parties were initially friendly or cordial with one another does not prevent a prescriptive right from arising").

Kelsey's use was continuous. Kelsey testified that her use was "on an almost daily basis, many times more than once on the same day." *Aff. of K. Morris*, ¶4. No evidence has been presented to dispute this testimony. Even if her use was occasional, it still satisfies the requirement for continuous use. *See Cook v. Hartman*, *supra*, ¶29.

Kelsey used the road for more than five years. At the very least, Kelsey has been using the road since she moved onto the property on March 1, 2001. *See Supp. Aff. of K. Morris*. The complaint was filed in August 2006 – more than five years after Kelsey's actual use. Kelsey would also be entitled to claim the use of her renters since she took ownership in 1996. *Cook v. Hartman*, *supra*, ¶28. However, those facts are not necessary since Kelsey herself used the road for more than five years.

B. Badleys cannot establish their burden that Kelsey's use was permissive, or, at the least, it remains undisputed that Kelsey's use ripened into an adverse use because it exceeded the scope of permission.

Having established the elements of an easement by prescription, the burden shifts to the Badleys to establish that Kelsey Morris' use was permissive. Badleys cannot sustain their burden and summary judgment for Morris is proper. Either Badleys did not properly give permission to Kelsey Morris as the owner of Tract

10JAA, or, at the very least, the undisputed evidence is that Kelsey's use ripened into a prescriptive right by exceeding the permission given.

The evidence is clear that Badleys did not grant permission to Kelsey. *E. Badley Depo.* at 64:23 to 65:8; *see also Def.'s M.S.J.* Therefore, as to the Morrises, Badleys cannot sustain their burden to establish her use was by permission.

Even assuming Badleys granted permission for the limited scope of passing oncoming traffic, the evidence is undisputed that Kelsey Morris exceeded this scope. Use can ripen into an adverse or hostile right where it exceeds the scope of the permission granted and is used in such a manner for the statutory period. *Wilson v. Chestnut*, 164 Mont. 484, 490, 525 P.2d 24, 27 (1974), citing *Thompson on Real Property (1961 Replacement)*, Easements, § 34. Kelsey Morris testified to her use of the roadway, which far exceeded the scope of any alleged permission:

> Since moving into the house at this address, I have traveled from this house to the public road known as Cobbler Village Road across a strip of land some 30 feet in width along the western boundary of the land of Plaintiff Elaine and Daniel Badley. This 30 foot strip is what the Badleys call their driveway. I have traveled across this land of the Badleys' on an almost daily basis, many times more than once on the same day, usually in broad daylight and sometimes at night.

Aff of K. Morris, ¶4.

Badleys did not refute this evidence. Therefore, Kelsey has established prescriptive rights despite the Badleys' argument that they granted permission.

CONCLUSION

Judgment should be granted to John Morris. At a minimum, the district court should be reversed and remanded for trial.

RESPECTFULLY SUBMITTED this 26 day of May, 2010.

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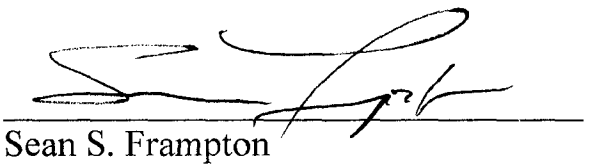
By: 
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CERTIFICATE OF COMPLIANCE

I, Sean S. Frampton, attorney for Defendant/Appellant, hereby certify that Defendant/Appellant's Brief complies with Mont. R. App. P. 11:

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DATED this 26 day of May, 2010.

Attorney for Defendant/Appellant

By: _____
Sean S. Frampton

CERTIFICATE OF SERVICE

The undersigned, does hereby certify that on this 24 day of May, 2010, a true and correct copy of the foregoing Appellant's Brief and was served by U.S. mail, in a properly addressed envelope, postage prepaid, on counsel of record for all parties to the action below in this matter, as follows:

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